No. 22,725

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

MARGARET ELIZABETH CLINE, as surviving wife of ROBERT HERRICK CLINE, Deceased; PLATT CLINE, as Guardian of the Estates of Robert Herrick Cline II and Kelly Michael Cline,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

REPLY BRIEF OF THE APPELLANT

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I

The Evidence Shows that Cline's Death was Due in Whole or in Part to His Own Negligence.

A basic conflict in this case results from appellees' insistence that Cline was a neophyte who was unwittingly led to his death by a careless employer. In support of this thesis they cite Fluor v. Sykes, 413 P. 2d 270 (Ariz.), and Amacker v. Skelly Oil Co., 132 F. 2d 431 (C.A. 5). Two more inapposite cases could hardly be found. In each instance the

employer was knowledgeable and experienced in the field in which the employee was working, retained control of the operation, and was held liable for negligence in exercising that control.[1/]

In the case before this Court the Depot personnel, as might be expected in a small Arizona town, were inexperienced and without any knowledge of the problems and hazards connected with scuba diving except for the fact that Patterson understood that divers wore safety lines.

Nor did the Depot personnel represent to Cline that they were experienced in scuba diving techniques. On the contrary the record is clear that Cline was hired because of his expertise, and that the Depot personnel necessarily gave him a free hand to do as he wished. As McKissick testified, "He (Cline) was a skin diver and I thought he knowed what he was doing. . ." (Tr. 82.)

As for Cline himself the record is clear that he was an experienced scuba diver -- had organized the scuba diving unit

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1/ An interesting case is Schweitzer v. Gilmore, 251 F. 2d 171 (C.A. 2, 1958). A guest at a mountain resort was sunbathing on a raft, when it came loose and floated out into the lake. He tried to swim ashore, and, although apparently a proficient swimmer, drowned. The estate brought an action charging that the resort was negligent in having failed to provide any life saving equipment, floatlines, guards or lifeboats. Judgment was for the defendant, the jury finding that the resort was not guilty of negligence, as contended.

Also see Eutsler v. United States, 376 F. 2d 634 (C.A. 10, 1967) where suit was filed against the United States for the death of an employee of the Hercules Co. killed in an explosion. The Court held that although the United States had undertaken to administer a safety program, control of the plant and the employee was in Hercules, and the United States was not liable.

for the Sheriff, represented himself to be qualified, and hired himself out for scuba diving jobs. He was not an ignorant employee relying for his protection upon an experienced employer. He was an independent contractor doing a job requiring expertise in his own way.[2/] The only advice given to him by the Depot -- to wear a safety line -- was rejected. Under these circumstances it is highly illogical for appellees to complain of inadequacies in equipment or personnel. For if these factors, or any one of them, constituted a hazard to Cline, he and he alone had sufficient know-how to recognize the danger, and to take any necessary precautions.

Even appellees' expert, Van Zandt, testified that the diver makes the determination as to the adequacy of the equipment and personnel. He said (Tr. 234):

> Q: Well, in the final analysis, Mr. Van Zandt, it is a correct statement, is it not, if you are a diver you make the determination as to the equipment, the type of equipment, additional personnel or lack of personnel; is that correct, sir? (Emphasis supplied.)
>
> A: Yes.

2/ Appellees state that the Government has not indicated the evidence supporting its statement that Cline was a contractor not an employee (Brief, p. 3). The fact is that the District Court has so found -- indicating its reasons (R. 225, 230). Appellees have not taken exception to this ruling, and it is fully supported by the evidence. (Tr. 26-27, 57-58.)

Affirmatively, appellees concede that Cline did not use a safety line or call for or provide a buddy diver, and as the record shows beyond possibility of contradiction, the use of a safety line and/or a buddy diver are cardinal requirements in any diving operation. Since appellees, of course, cannot deny that had Cline used a lifeline or refused to proceed without a buddy diver, he would not have drowned they seek to excuse the violations. They say that a lifeline was not used because (1) there was a heavy growth of weeds (conceded) and (2) that Cline made circular passes which would have been difficult had a lifeline been attached.[3/] But the point which the appellant made (Brief, p. 39) and which appellees have chosen to ignore is this. Why would Cline have to make circular passes in weed infested waters?

Appellees' expert, Van Zandt, testified that weeds are an extra hazard, that "you have the danger of being entangled in them" (Tr. 233), and that if a circular pattern were followed in weeds the lifeline would become entangled, which would exhaust the diver (Tr. 224). But appellant is not aware of any evidence that a diver must make circular passes -- and reason suggests that there must be many patterns which one can follow in searching for objects on a pond bottom. Reason also suggests that if, as Van Zandt testified, weeds obscure "wires, trees and anything

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3/ Appellant challenges this contention. See opening brief, pp. 39-40.

of that sort", which can entangle, and be "extremely dangerous to the diver" (Tr. 223), the diver should have used every precaution. First, in the absence of a buddy diver to rescue him, were he entrapped on the bottom, he should have used a safety line and avoided circular patterns. Second, had there been some overriding necessity for making circular passes, not disclosed by the record, he should have refused to proceed until a buddy diver could be provided.

In Fluor Corp. v. Sykes, supra, relied upon by appellees, the Court found the following instruction to be a correct statement of the law (p. 276):

> . . . Under our law every person in the management of his own affairs is charged with a duty to use reasonable care for his own safety. Donald Sykes had such a duty and in doing his work he was required to observe all the precautions which would have been used by a reasonable man in like circumstances. The amount of care required depends upon the relative safety of the activity being undertaken. The more danger which is attendant on any given activity, the more care is required. (Emphasis supplied.)

With regard to Cline's failure to call for or provide a buddy diver, appellees' answer is that with so many people on shore, and with two men in the boat a buddy diver wasn't necessary (Brief, p. 41). A response to such a thin explanation hardly seems necessary. A buddy diver is equipped -- he is knowledgeable -- he is trained. And despite the efforts of six men (four on shore) to save Cline, he drowned. That he would

have been saved had an experienced diver been on hand to assist him, by releasing the weights -- and by bringing him up from the bottom if he sank, appellees have not denied. On the need for a buddy diver we can again cite appellees' expert, Van Zandt, who testified that on one occasion he was employed to recover an impeller blade from one of the dams, which had sunk in the Salt River. He stated that he determined that two divers were necessary, that he, not the employer, determined what equipment would be needed, since he, not his employer, was skilled in diving, and that had the employer told him to dive without a buddy diver he would have told him to go fly a kite (Tr. 227-230).[4/]

Thus appellees' own witness, their one expert, made it clear that a diver assumes the responsibility for his own safety by determining the nature and sufficiency of the equipment and personnel needed. Here, Cline made a determination to dive without either a lifeline or a buddy diver, and this decision, we submit, either caused or contributed to his death.[5/] And in

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4/ Plfs. Exh. 16, p. 7 states: "The 'buddy' system should always be used whenever a scuba diver must work without a lifeline or dependable means of communication with surface personnel."

5/ Even appellees concede that the unit divers were instructed to dive only in pairs (Brief, p. 13). The testimony cited by the appellees is worth quoting (Tr. 245):

> Q: (To Mr. Shoemaker) Did you . . . become familiar with safety regulations that were promulgated to members of the diving unit?

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the State of Arizona, contributory negligence of the slightest degree defeats recovery. Boies v. Cole, 407 P. 2d 917 (Ariz., 1965).

II

The Doctrine of Last Clear Chance Is Not Applicable in the Instant Case. 6/

In view of the circumstances present in this case, noting particularly the fact that the equipment and personnel of which appellees complain, were able to get the boat close to Cline on two occasions, it is appellant's conviction that the only genuine issue in this case revolves about the applicability of the Last Clear Chance doctrine, cited by the District Court, and relied upon by appellees.

5/ (Continuation)

A: Yes sir.

Q: Can you tell me what those were, sir?

A: . . . the main ones were that first off we never made any dive whatsoever during nightime conditions. Another one was that under no circumstances, and nothing was important enough to change this, the way we figured, under no circumstances was any dive to be made by a single person. There was no dive to be made unless you had a crew on top with a diver standing by in case of emergency . . . (Emphasis supplied.)

6/ Although the District Court found that Cline was not negligent, it also found that the Government was liable under the Last Clear Chance doctrine, and this doctrine presupposes the negligence of the injured party.

Appellees in support of their thesis cite several auto accident cases, which, merely state the general rule; and we concede that if a driver, seeing another who has placed himself in a position of peril, has a clear chance of avoiding an accident, he is liable if his lack of prudence causes an accident. Here, we, of course, agree that Cline placed himself in a position of peril, but in the emergency circumstances there was no "clear" chance to save Cline; and a last "clear" chance, not a last "possible" chance is essential. Kerlik v. Jerke, 354 P. 2d 702 (Wash., 1960).

In Roloff v. Bailey, 281 P. 2d 462 (Wash., 1955), a pedestrian was killed by a car which, apparently in an effort to avoid him, skidded 90 feet. Judgment for the defendant was affirmed, and with regard to the Last Clear Chance doctrine the Court said, p. 464:

> Appellant asserts it is possible for respondent to have had an opportunity to avoid a collision by swerving his car to the left . . . It is difficult to imagine a case where a jury could not find that it was possible for a driver to have elected some successful course of action, other than the one that failed. That is not the test of the applicability of the Last Clear Chance doctrine. In Shiels v. Parfeert, 39 Wash. 2d 252, 235 P. 2d 164, we said:
>
> > The quantum of his effort precludes finding that he had a last clear chance to avoid the injury. The nature of the effort can be of any kind that a reasonably prudent man might make. If the quantum of such an effort to avoid an injury is commensurate with the opportunity to do so, the existence of a last clear chance is negatived.

If a driver of an automobile can be excused for making the wrong turn, it seems inescapable that McKissick is entitled to the same consideration. A driver is knowledgeable about the handling of a car. He has passed a test. He has limited choices in an emergency. He can apply the brakes, or turn to right or left or proceed forward. But McKissick was not in the position to fall back upon prior practice and experience. He wasn't faced with an emergency comparable to the many close "shaves" that any automobile driver is likely to encounter. He was confronted with a situation foreign to his experience.

In the final analysis the District Court and appellees have found the Depot responsible for Cline's death because McKissick approached the men in the water from the downwind rather than the windward side.[7/] Like the motorist he should have turned left instead of right. Had McKissick gone the other longer route, and Cline had sank in the interval, without doubt appellees would have contended that McKissick was negligent for failing to proceed directly toward the men in the water. In any event, McKissick was not a ship's master, schooled in handling this type of emergency. Cline, who might have anticipated trouble, made no effort to coach the two men as to their function

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7/ Appellees state that McKissick first threw the rope, and then threw the life jacket, concluding "If he was not negligent on his first throw, he surely was on his second." (Brief, p. 31.) This is a non-sequitur. For even if McKissick were as completely composed as appellees assume he should have been, why should he have concluded that if the wind resisted a rope it would also resist a life jacket?

in the event of an emergency. The record shows that his conversation with Giles and McKissick was limited to Cline's rejection of the safety line, his need for additional weights, the shortage of air in the tanks, the coldness of the water, the manner in which he could slip out of the weights, and his tiredness. (Tr. 77, 81-82, 86, 101-102, Giles Dep., pp. 7, 8, 16, 18.)

The ultimate fact is that McKissick and other Depot personnel made every effort to effect a rescue, as demonstrated by the summary of the evidence in the appellant's opening brief, pp. 27-33; and we respectfully submit that McKissick and the Depot personnel should not be branded as responsible for Cline's death because years later, in the quiet of a courtroom, it is arguable that some other course of conduct might have saved Cline. As the Court in the Baltimore and Ohio RR Co. v. Postom case, cited at p. 36 of our opening brief, aptly stated, "The law makes allowances for the fact that when confronted with a sudden emergency and immediate peril, some people do not think rapidly or clearly and failure to do so does not constitute negligence as a matter of law."

Conclusion

Apart from Cline's negligence manifested by his violation of cardinal diving principles, Cline's death was a tragic accident brought about by an unhappy combination of circumstances --

the weeds which discouraged him from wearing a safety line -- the wind -- the cold water -- Cline's size (he weighed 225-230 pounds) (Harmon Dep., p. 45) -- Cline's failure or inability to release the weights which were dragging him down -- and his terror.[8/] The men present did their best to rescue him. Giles and Patterson almost drowned, and had to be hospitalized. Aragon, too, was taken to the infirmary. Poor McKissick who candidly admitted that his nights are troubled by thoughts of what other course he could or should have pursued -- vainly leaped into the water, when he saw that Cline had disappeared from view. If these facts are proof of negligence -- if McKissick is judicially censured for bringing about the death of Cline, then we can begin to comprehend why men in our modern life hesitate to go to the aid of other men in peril.

8/ Appellees would have us believe that Cline calmly went to his death. They rely principally on the testimony of Cline's wife. Whether two men close together in the water are engaged in a struggle is difficult to discern. But the man who was there - Giles - knew. He testified that Cline was frantic -- and kept dragging him under (Dep., pp. 9-13, 20, 21, 26), a fact borne out by the testimony of Marshall, Tr. 11, Teninty Dep., p. 19, Aragon Dep., p. 12. Giles had no motive to color the facts. He wasn't a Government employee. No one blamed him for Cline's death. And rationally, if Cline were as calm as Mrs. Cline pictured him, why didn't he release the weights which dragged him under -- why didn't he make an effort to swim? When he came to the surface in trouble, helpless -- was he likely to be calm -- or was he likely to be terrified at being unable to save himself. Something was desperately wrong. He may have had a severe cramp or an embolism or some other severe disorder. (See the Navy Manual for all of the afflictions which can plague a diver, pp. 127-177, Plfs. Exh. 14 .) In such a state is he likely to have calmly sank to his death?

III

Income Tax Deductions Should Have Been Made.

In the appellant's opening brief we pointed out the fact that the damage awarded the appellees did not take into account income tax deductions. Appellees respond by arguing:

1. That the issue had not been presented to the trial court, and could not be raised at the appellate level.
2. That the Government had stipulated the damage figure, and was bound thereby.
3. That under Arizona law, the Court is not required to take income tax deductions into account.

With respect to the first contention appellant does not challenge the general rule relied upon by appellees. However, there is a corollary, well stated by the Supreme Court in Hormel v. Helvering, 312 U.S. 552 (1941):

> There may always be exceptional cases or particular circumstances which will prompt a review by the appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below . . . Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts would invariably and under all circumstances decline to consider all questions which have not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

And if the new matter involves an issue of law, and the public interest is involved the appellate court will, if

injustice might otherwise result, consider the new issue. Mulligan v. Andrews, 211 F. 2d 28 (D.C.A., 1954).

Hence, the threshold question for this Court to decide is whether in this case the public interest is involved, and whether injustice might result if the issue is not given consideration. Appellant believes that this question is one of genuine magnitude. In many damage cases involving the Government and private citizens the income tax question must be resolved, and since as we noted in our opening brief the law is not altogether clear this case presents an appropriate vehicle for enunciating the principles which should be applied under the Arizona and like statutes.

With respect to the stipulation, it is before the Court in its entirety, and the Court will note that the agreement explicitly sets forth (1) the decedent's life expectancy (work life expectancy may have been more appropriate), (2) the amount of money needed to return $500 a month for the period of the life expectancy, and (3) the deduction to be made for the support of the decedent (20%). The stipulation doesn't mention income tax, and appellant suggests that this Court should not, by implication, conclude that the Government stipulated away its right to have a deduction made for income taxes.[9/] (This, apart from the fact that Government

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9/ Appellees appear to place great reliance upon Morse Boulger Destructor Co. v. Camden Fibre Mills, 239 F. 2d 382 (C.A. 3). (See Brief, pp. 57-58.) There, defendant had purchased an incinerator from plaintiff, who brought suit upon non-payment.

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counsel is not authorized to give away Government funds.) It is possible, of course, that counsel for both parties overlooked the problem, but if there was any mutual intent to deny the Government the benefit of the deduction it should have been expressly stated, and not left to surmise.

With respect to the law, appellees' principal argument seems to be that even though income tax deductions are proper in some cases there is no requirement that such deductions be made. Appellees appear to rely on several cases cited by appellant:

In LeRoy v. Sabena Belgian World Airlines, 344 F. 2d 266 (C.A. 2, 1965), the decedent's projected income was $16,000 to $25,000, and the District Court made deductions for estimated income taxes. The Court said, p. 276 "Whether or not the District Court was required to allow for the effect of income taxes in this case, we think that it was at least a proper exercise of its discretion to do so . . . Certainly the risk that the federal and New York governments will cease to take a substantial portion of

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9/ (Continuation)
The two parties stipulated that "defendant is indebted to plaintiff in the amount of $6,300, being the price of the incinerator and that the Court may enter a verdict in that amount in favor of the plaintiff. . ." Faced with this express agreement the Court of Appeals ruled that the lower court had been in error in allowing interest on the purchase price. In the case before this Court there was no express agreement about the amount of the judgment.

a $16,000 income is one of the smaller uncertainties involved in the computation in this case, and the 15% figure adopted by Judge Murphy is a reasonable estimate of what that portion would be." Hence, in this case deduction was made, and the Court declined to rule as to whether it had to be made.

In United States v. Sommers, 351 F. 2d 354 (C.A. 10, 1965), the Court in deducting income taxes from substantial projected incomes said, p. 360, "When dealing with such an imprecise and speculative subject, the best that can be hoped for is reasonableness. It is a determination best left to the exercise of the sound discretion of the trial judge, whether with or without a jury." We agree that there must be discretion in the trial court to determine whether income tax deductions would be significant enough to require an accounting; but we do not agree, and the cases do not hold, that if there is an admittedly large income involved, such as in this case, the trial judge can close his eyes to the evident fact that income taxes would be a significant factor.

Furthermore, in the instant case it is plain enough that the judge did not exercise any discretion whatsoever, because the issue was not presented to him by either party. Had he taken into account the prospective income tax payments, but concluded that they were not sufficient in size to require a deduction, then a sharp issue would be presented as to whether he had abused his discretion.

In Petition of Marina Mercante Nicaraguense, S.A., 364 F. 2d 118 (C.A. 2, 1966), the Court adhered to the McWeeney ruling, and concluded that plaintiffs' incomes ranging from $9,300 to $11,500 did not warrant a deduction for income taxes. However, with respect to high incomes the Court said, by way of dictum, p. 125 ". . . in such cases some appropriate deduction should be made."

In brief, we don't know of any case cited by either party in which a court has ruled that it can ignore income tax deductions in high income situations. And we suggest that the discretion relied upon by appellees must relate to a determination as to what a high income situation is. Certainly, by all standards there would be substantial income taxes paid by one earning $24,000 a year.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Carl Eardley

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AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

CARL EARDLEY, being duly sworn, deposes and says:

That on September 17, 1968, he caused three copies of the foregoing Reply Brief of the Appellant to be served by air mail, postage prepaid, upon counsel for the appellees:

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CARL EARDLEY
First Assistant, Civil Division,
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Subscribed and sworn to before me this 13th day of September, 1968.

Audrey Anne Crump
Notary Public

My Commission expires August 31, 1971.